

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Request from the United States Court of Appeals
for the Ninth Circuit to Answer a Certified Question

Honorable Barry G. Silverman, Circuit Judge

In re Certified Question,

PETER DEACON,

Plaintiff-Appellant,

v.

Docket No. 151104

PANDORA MEDIA, INC.,

Defendant-Appellee.

Supplemental Brief on Merits of Certified Question – Appellant

ORAL ARGUMENT TO BE SCHEDULED

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STATEMENT OF JURISDICTION

In an order dated September 25, 2015, this Court accepted for consideration the question certified from the United States Court of Appeals from the Ninth Circuit. Jurisdiction is secure under MCR 7.301(A)(5).

STATEMENT OF QUESTIONS PRESENTED

1. Has Deacon adequately alleged that Pandora “rents” or “lends” sound recordings within the meaning of the Video Rental Privacy Act, MCL 445.1711–445.1715?

Federal District Court Answer: No

Federal Court of Appeals Answer: N/A

Deacon’s Answer: Yes

Pandora’s Answer: No

2. Has Deacon adequately alleged that he “borrows” sound recordings from Pandora within the meaning of the Video Rental Privacy Act?

Federal District Court Answer: No

Federal Court of Appeals Answer: N/A

Deacon’s Answer: Yes

Pandora’s Answer: No

3. Has Deacon adequately alleged that Pandora disclosed a record of the sound recordings Deacon borrowed from Pandora that indicates Deacon’s identity?

Federal District Court Answer: Yes

Federal Court of Appeals Answer: N/A

Deacon’s Answer: Yes

Pandora’s Answer: No

STATEMENT OF THE CASE

Pandora Media, Inc., provides its customers with a customizable online music experience. But, Peter Deacon alleges, for a time that customization came at a significant—and undisclosed—cost: A user’s name and personal listening history was made available to any of their Facebook contacts via that social network, and was accessible *by anyone* through a simple Google search.

A. The VRPA

“[A] person’s choice in reading, music, and video entertainment is a private matter, and not a fit subject for consideration by . . . anyone else[.]” *Privacy: Sales, Rentals of Videos, etc.*, House Legislative Analysis Section, HB 5331, Jan. 20, 1989. So concluded the Michigan Legislature more than a quarter-century ago. That belief spurred the passage of Michigan’s Video Rental Privacy Act (“VRPA” or “the Act”), MCL 445.1712.

The Act prohibits any company “engaged in the business of selling at retail, renting, or lending . . . sound recordings” from disclosing “a record or information concerning the purchase, lease, rental, or borrowing of [sound recordings] by a customer that indicates the identity of the customer” without the customer’s written permission. MCL 445.1712. A “customer” is someone “who purchases, rents, or borrows . . . a sound recording.” MCL 445.1711. The Act does not define “sell,” “rent,” “lend,” or “borrow.”

The Act was modeled on the similar, but notably narrower, federal Video Privacy Protection Act, 18 USC 2710. That federal law was prompted by, among

other things, the publication of the video rental records of the family of then-United States Supreme Court nominee Judge Robert Bork. That law narrowly prohibits disclosure of “personally identifiable information” that indicates someone’s choice in video entertainment. *Id.* § 2710(b)(1).

The public airing of Judge Bork’s video choices also was the catalyst for the Michigan Act. See House Legislative Analysis Section, H.B. 5331, Jan. 20, 1989. But the Michigan Legislature went much further than did Congress, giving statutory protection not only to records about a consumer’s choice in videos, but also to their choice in books and—relevant here—music. MCL 445.1712.

B. Pandora’s services

Pandora owns and operates www.pandora.com. (Appendix at 140a.)¹ Through that website Pandora runs, essentially, a for-profit sound recording library. (*Id.*) Pandora has licensed an enormous collection of music that it makes available to its users. (*Id.*) Pandora’s central selling point is what it terms the “Music Genome Project,” an algorithm that helps users customize their music-listening experience. (*Id.*; S-1 Reg Stmt, at 1.)

In order to take advantage of Pandora’s algorithm, a user registers for an account. (Appendix at 140a.) A user’s account is associated with an individual profile page, or a “Personal Page.” (*Id.* at 140a, 144a.) That “Personal Page” displays the user’s full name, customized stations, recent activity on Pandora, listening

¹ Citations to “Appendix” refer to the appendix filed with this Court on April 22, 2015, in conjunction with Peter Deacon’s Brief Supporting Request for a Certified Question.

history, and songs and artists the user has bookmarked. (Id. at 144a.) In essence, a Pandora user's "Personal Page" is a compendium of their musical tastes.

Users then create customized "stations" (a twist on traditional radio) that generate playlists based upon the user's stated musical preferences. (Id.) A user can create a station based on her preference for a single song, an artist, or a genre. (Id.; S-1 Reg Stmt, at 1.) The user can further refine her station by telling Pandora that she likes or does not like a song Pandora has suggested. (S-1, at 3.)

Once a station is created, Pandora transmits files containing songs for playback to the user's computer. (Id. at 143a.) The user's computer then automatically plays transmitted songs. As part of this process, Pandora transmits a single file containing the entire song, and stores it in the temporary memory of the user's computer. (Id.) That track—and all others played during the listening session—remains in the computer's temporary storage until Pandora is closed on the computer. (Id.)

C. Pandora's disclosure of users' personal information

In order to register a personal account with Pandora, a user must agree to Pandora's Terms of Use and Privacy Policy. (Id. at 144a.) Under the Terms of Use, users promise not to "steal" music through Pandora. (Id. at 136a.) In legalese, users pledge not to "reproduce copyrighted materials" or "copy, store, edit, change, prepare any derivative work of or alter in any way the tracks streamed through the Pandora Services." (Id. at 138a.)

In return, Pandora binds itself to the site's Privacy Policy. Pandora's Privacy Policy notes that the site "offer[s] site-wide community features designed to help other registered users and subscribers find music they like." (Pandora ND Cal Br Mot to Dismiss, at 15.) That "community" function is accomplished by allowing users to derive inspiration from stations developed by other Pandora users. But the Privacy Policy also promises that a user's listening history, and thus their music choices, will be available in only one of two ways: "[E]ither in an anonymous form or to registered users or subscribers *who know your email address and specifically request your station by entering your email address in the applicable field on our site.*" (Id. (emphasis added)) Thus, Pandora pledged to reveal private information about its users only to (1) other registered users, who (2) know an individual's email address. (Appendix at 141a, 144a.) As such, anyone who wished to protect her privacy could register under a pseudonym, or with a fake email address. (Id. at 144a.)

As it happens, however, a user's musical tastes were freely available to anyone with access to Google. (Id.) In apparent breach of its Privacy Policy—not to mention the VRPA—Pandora made its users' private "Personal Pages" accessible to Internet search engines. (Id. at 144a n 3, 148a.) That exposed a Pandora user's name, email address, and musical tastes to the World Wide Web.

What's more, in April 2010 Pandora, without obtaining the consent of its users, correlated its users' Pandora accounts with their Facebook accounts. (Id. at 144a.) As a result, a Pandora user's musical tastes were freely available to all of his

or her Facebook contacts. (*Id.* at 141a, 144a.) Moreover, once Pandora integrated its service with Facebook, individuals who had attempted to shield their private information through a pseudonym were out of luck: their listening histories were now attached to their Facebook accounts, and, by extension, their true identities. (*Id.* at 141a, 144a)

D. The federal court litigation

Peter Deacon, a Pandora user, sued Pandora under the VRPA for its flagrant disclosure of his personal information on the Internet and through Facebook. Invoking the federal court’s diversity jurisdiction, Deacon filed his claim in the United States District Court in Oakland, California. The district court found that “[Deacon] has sufficiently alleged the disclosure of information governed by the VRPA[:] [he] alleges that Pandora disclosed his name and ‘listening history,’ i.e., a list of the songs he listened to on Pandora’s radio service, to the general public.” (*Id.* at 120a.) The district court nevertheless dismissed the complaint, holding that Deacon did not plausibly allege that Pandora rented, lent, or sold music to him. (*Id.* at 126a.) On appeal, the United States Court of Appeals for the Ninth Circuit also stated that Deacon sufficiently alleged that Pandora disclosed information protected by the VRPA, and that resolution of the appeal turned on whether Pandora rented or lent music to him. (*Id.* at 283a n 4.).² The Ninth Circuit appropriately recognized

² In an amended order, the Ninth Circuit deleted footnote 4, and instead chose to express no opinion whether Pandora’s disclosures “indicated” Deacon’s identity. (See Appendix at 297a.) It is notable, however, that any time a court has taken a position on the content of Pandora’s disclosures, it has found that they “indicate” Deacon’s identity.

that whether Pandora “rents” or “lends” music under the statute turns on an as-yet unanswered question of Michigan law, and asked this Court for guidance before proceeding further. (Id. at 298a.)

ARGUMENT

Michigan has long recognized the importance of personal privacy. See *De May v Roberts*, 46 Mich 160, 165–66; 9 NW 146 (1881) (noting a “legal right” to privacy in certain personal matters, which “the law secures . . . by requiring others to observe it, and to abstain from its violation”). Further, this Court quite recently recognized that even seemingly mundane or innocuous information can unlock the doors to an individual’s private affairs. See *Mich Fed’n of Teachers v Univ of Mich*, 481 Mich 657, 676–77 & n 59; 753 NW2d 28 (2008) (holding that disclosure of just a name and home address was an “unwarranted invasion of an individual’s privacy”). Protecting these basic details about a person’s life is key to ensuring a meaningful “right to be let alone.” See *Kastenbaum v Mich State Univ*, 414 Mich 510, 523–24; 327 NW2d 783 (1982) (opinion of FITZGERALD, C.J.). Consistent with this tradition, the VRPA provides statutory protection to some basic details about person’s life.

To succeed on a VRPA claim, a plaintiff must ultimately establish the following four elements:

- (1) The defendant was ... engaged in the business of selling at retail, renting, or lending books or other written materials, sound recordings, or video recordings;
- (2) The plaintiff purchased, leased, rented, or borrowed a book, sound or video recording, or other written materials from the defendant;

(3) The defendant disclosed to another person, other than the plaintiff, a record or information concerning the plaintiff's purchase, lease, rental, or borrowing of any of the listed materials; and

(4) The disclosed record or information indicated the plaintiff's identity.

Hon. William B. Murphy & John Vanden Hombergh, *Michigan Non-Standard Jury Instr Civil* § 32:10 (2014).

The Ninth Circuit seeks this Court's input on a single question: Did Deacon plausibly allege that, as a matter of substantive Michigan law, Pandora "rented" or "lent" music between 2008, when Deacon registered a Pandora account, and 2011, when this lawsuit was filed? This supplemental brief also addresses, at the Court's request, whether Deacon has plausibly alleged the remaining elements of his claim under the VRPA. Both questions are cast in terms of Deacon's burden at the pleadings stage of the litigation.

Because this case arose in and will return to the federal court, federal procedural rules cabin both of these inquiries.³ This Court must therefore assume the truth of Deacon's factual allegations. *Ashcroft v Iqbal*, 556 US 662, 679; 129 S Ct 1937; 173 L Ed 2d 868 (2009); *Doe I v Nestle USA, Inc*, 766 F3d 1013, 1018 (CA9, 2014); see also *Nietzke v Williams*, 490 US 319, 327; 109 S Ct 1827; 104 L Ed 2d 338 (1989) ("What Rule 12(b)(6) does not countenance are dismissals based on a judge's

³ In a diversity case, "any challenge to [the] Plaintiff's ability to state a claim and satisfy pleading standards is governed by federal law." *Vesta Corp. v Amdocs Mgmt. Ltd.*, 80 F Supp 3d 1152, 1158 (D Or, 2015); see *Dunbar v Wells Fargo, N.A.*, 709 F3d 1254, 1257 (CA8, 2013). In broad strokes, however, the federal procedure is similar to a motion for summary disposition under MCR 2.116(C)(8). See *Maiden v Rozwood*, 461 Mich 109, 119–20; 597 NW2d 817 (1999).

disbelief of a complaint's factual allegations.”). Those allegations, plus any information contained in documents incorporated by reference into the complaint and any relevant adjudicative facts admissible under Federal Rule of Evidence 201 (which pertains to judicial notice), are the only facts germane to the Court's analysis. See *Tellabs, Inc v Makor Issues & Rights, Ltd*, 551 US 308, 322; 127 S Ct 2499; 168 L Ed 2d 179 (2007); *Daniels-Hall v Nat'l Educ Ass'n*, 629 F3d 992, 998 (CA9, 2010); see also *Dreiling v Am Exp Co*, 458 F3d 942, 946 n 2 (CA9, 2006) (noting that SEC filings are a proper subject of judicial notice).

Moreover, the burden on the plaintiff at the pleadings stage is minimal. See *Starr v Baca*, 662 F3d 1202, 1216 (CA9, 2011). A complaint need only contain a “short and plain statement” demonstrating that a claim has “substantive plausibility.” FR Civ P 8(a)(2); *Johnson v Shelby*, 135 S Ct 346, 347; 190 L Ed 2d 309 (2015); *Rivera v Peri & Sons Farms, Inc*, 735 F3d 892, 899 (CA9, 2013). And in making that showing, general factual allegations are assumed to embrace the specific facts necessary to support them. *Lujan v Nat'l Wildlife Fed'n*, 497 US 871, 889; 110 S Ct 3177; 111 L Ed 2d 695 (1990).

In short, because the Ninth Circuit asked this Court whether Deacon has adequately alleged that Pandora violated the VRPA, and because, under federal pleading standards, facts alleged in a complaint are taken as true, the certified question essentially asks whether the facts alleged in Deacon's complaint—taken as true—constitute a violation of the VRPA. As explained below, they do.

I. Because Pandora transmits to a user a digital file containing an entire song for the user's temporary enjoyment, Pandora "lends," and Deacon "borrowed," sound recordings.

Discerning the meaning of the statutory terms "rent" and "lend" is an exercise in statutory interpretation. See *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014). "The primary goal of statutory interpretation is, of course, to give effect to the Legislature's intent." *Id.*; see *Robinson v Lansing*, 486 Mich 1, 15–16; 782 NW2d 171 (2010). Two predominant maxims of interpretation follow from that overriding objective: Courts should adhere as closely as possible to the plain language of the statute, see *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012), and statutes must be read "as a whole," *Robinson*, 486 Mich at 15.

Dictionary definitions and the ordinary usage of actors in the business of "lending" digital media demonstrate that to "lend," one need only grant another temporary access to the thing being lent or loaned. That is precisely how Deacon alleges that Pandora operates. He has, therefore, adequately alleged that Pandora "lends" music within the meaning of the VRPA. Deacon also alleges sufficient facts to plausibly establish that he "borrowed" music from Pandora, and that Pandora disclosed statutorily protected information about him, like his name and email address. Pandora's responses ignore the statute's text, read words and phrases in isolation, or seek to confuse the issues. None of Pandora's responses have any merit.

A. "Lending" requires the grant of temporary access or control.

The starting point for determining the plain meaning of undefined statutory terms is dictionary definitions. See *Badeen*, 496 Mich at 82; *People v Laidler*, 491

Mich 339, 347; 817 NW2d 517 (2012). Black’s Law Dictionary defines the verb “lend” as “[a]n act of lending: a grant of something for temporary use.” Black’s Law Dictionary (9th ed. 2009). “Lend” also is commonly defined as “[t]o contribute or impart,” “to provide,” or “to furnish or impart.” See *The Free Dictionary, Lend*, <<http://www.thefreedictionary.com/lend>> (accessed Nov. 6, 2015) (citing *The American Heritage Dictionary of the English Language, Collins English Dictionary—Complete and Unabridged* (5th ed), and *Random House Kernerman Webster’s College Dictionary* (2010)). In the same vein, Merriam-Webster defines “lend” as “to make something available to someone or something” or “to put at another’s temporary disposal.” Merriam-Webster Dictionary, *Lend*, <<http://www.merriam-webster.com/dictionary/lend>> (last accessed Nov. 6, 2015).

A common thread runs through these definitions: a person or corporation “lends” something by allowing another temporarily to access or control that thing without consideration. On the flip side, a person “borrows” a thing, be it a physical or digital object, from another if that thing is temporarily bestowed upon them, or they assume some measure of temporary control over that thing.

Consider a library. A library “lends” a book to a patron by placing the book at the patron’s temporary disposal. And this holds true whether the book is in hard copy or electronic form. The public library in Lansing, for instance, tells patrons “[y]ou can keep an eBook or audiobook for 21 days.” *Digital Downloads: OverDrive FAQ*, <<http://www.cadl.org/contact-and-help/digital-downloads/faq/>> (accessed Nov. 6, 2015). “When your eBook or audiobook is due,” the library continues, “it is

immediately returned to the library. You don't have to worry about returning it." *Id.* The same is true for library patrons in, for instance, West Bloomfield,⁴ Detroit,⁵ and Traverse City.⁶

Pandora's compatriots in the Internet media distribution industry operate under similar assumptions. Amazon, for instance, allows users of its Kindle device to "lend" or "borrow" books by giving other Kindle users temporary access to a digital file containing the book while simultaneously giving up their own ability to access their copy of the file. See *Lend or Borrow Kindle Books*, Amazon Device Support, <http://www.amazon.com/gp/help/customer/display.html/ref=hp_rel_topic?ie=UTF8&nodeId=200549320> (accessed Nov. 6, 2015). Likewise, the popular iTunes service allows users to watch a movie for a period of 24 hours, after which the media file is removed from the user's computer. See *About renting movies from the iTunes store*, Apple, Inc. support, <<https://support.apple.com/en-us/HT201611>> (accessed Nov. 6, 2015). iTunes refers to "renting," of course, because the service requires payment, but the mechanics are otherwise the same.

⁴ *eLibrary—eBooks FAQs*, West Bloomfield Township Library, <<http://www.wbllib.org/elibrary/ebooksfaq.php>> (accessed Nov. 6, 2015) ("Titles check out for 21 days and are returned automatically.")

⁵ *OverDrive eBooks and audiobooks*, Detroit Public Library, <<http://www.detroitpubliclibrary.org/specialservice/overdrive-ebooks-and-audiobooks>> (accessed Nov. 6, 2015) ("eBooks and audiobooks may be checked out for a *loan period* of 14 or 21 days.") (emphasis added).

⁶ *We have E-Books*, Traverse Area District Library, <<https://www.tadl.org/downloadable>> (accessed Nov. 6, 2015) ("The e-books you download from TADL will automatically become unreadable and return themselves after the *lending period* is over.") (emphasis added).

Both dictionaries and widespread lay usage demonstrate unambiguously, then, that one can “lend” a digital file by giving another temporary access to the file. This is precisely what Deacon has alleged.

1. *Pandora’s responses contravene settled rules of statutory interpretation.*

Pandora resists this simple conclusion, arguing that “borrowing” necessarily requires a high level of activity on the part of the borrower. Both at the Ninth Circuit and in previous briefing before this Court, Pandora pinned its argument on the word “use”—a term Pandora switches out for “active use”—as it appears in certain definitions of the words “lend” and “borrow.” (Appendix at 192a-194a; Pandora Opening Mich Br, at 15.) In large part, this contention seeks to defend the district court’s conclusion that “lending” requires “volitional use.” (See Appendix at 121a, 123a.) But the district court’s reasoning hopped the tracks at the outset, and Pandora’s independent attempt to bolster the district court’s erroneous conclusion fails to withstand scrutiny.

The federal district court inexplicably chose to train a laser-like focus on the word “use” in its chosen definition of “lend.” (Id. at 121a) And having drifted off course, the district court compounded its error by concluding that a plaintiff must allege the “volitional use” of a file in order to “borrow” it. It drew that definition from a line of cases interpreting 18 USC 16, the federal law that defines “crime of violence.” (See Id. (citing *United States v Trinidad-Aquino*, 259 F3d 1140, 1145 & n 2 (CA9, 2001).) In fact, the full holding of *Trinidad-Aquino* is that a “crime of violence” requires the volitional use of force. See 259 F3d at 1145. The volitional-use

requirement is far more sensible in that context: Given the serious consequences that attach to convictions for “crimes of violence,” it makes sense to exclude convictions for negligent conduct. *See Leocal v Ashcroft*, 543 US 1, 11; 125 S Ct 377; 160 L Ed 2d 271 (2004). But statutory interpretation requires attention to both the plain meaning of words and phrases *and* their placement and purpose in the statutory scheme. *People v Houthoofd*, 487 Mich 568, 581; 790 NW2d 315, 324 (2010). By lifting *Trinidad-Aquino*’s holding out of its context, the district court’s analysis gives short shrift to this principle.

For its part Pandora doubles down on the district court’s error by invoking *Bailey v United States*, 516 US 137; 116 S Ct 501; 133 L Ed 2d 472 (1995). (See Pandora Opening Mich Br, at 15.) In *Bailey* the Supreme Court held that, in order to sustain a conviction under 18 USC 924(c) for “us[ing]” a firearm in relation to an underlying predicate crime, a prosecutor must prove beyond a reasonable doubt that the defendant “actively employed” the firearm. 516 US at 144. The Court adopted the active-employment standard only to avoid rendering two other statutory terms—“possess” and “carry”—superfluous. *Id.* at 145–47. Indeed, the Court emphasized that “the word ‘use’ poses some interpretational difficulties because of the different meanings attributable to it.” *Id.* at 143. Specifically, the Court noted that “use” could entail an active or passive connotation. *Id.* But in light of the particular statutory context, the Court resolved that tension in favor of the defendant, and adopted the “active” version of “use.”

Bailey is unhelpful. The VRPA lacks the peculiar attributes of § 924 that drove the *Bailey* Court's interpretation. In the first place, the VRPA contains no phrase that would be rendered superfluous without adopting an extra-textual "active use" requirement. And in any event the word "use" never appears in the VRPA so the entire line of argument focused on "use" is utterly misplaced. See *Brown v Mayor of Detroit*, 478 Mich 589, 595–96; 734 NW2d 514 (2007) (vacating grant of summary judgment because purported factual dispute revolved around requirement not a part of the statute, and thus dispute was immaterial).

And even assuming that the "use" of a borrowed item is relevant to the act of lending or borrowing, *Bailey* demonstrates that importing the word "use" into the VRPA introduces ambiguity. If anything, because the VRPA is a remedial, consumer-protection statute, that ambiguity should be resolved in the consumer's favor. See *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220, 233 n 12; 666 NW2d 199 (2003); 3 Sutherland Statutory Construction § 60:1 (7th ed) (Westlaw database updated 2015). By arguing for a restrictive reading of the word "lend" based upon a word that doesn't even appear in the statute, Pandora is inviting this Court to create ambiguity where none exists, and then to resolve that ambiguity against the consumer. No accepted interpretive canon tolerates Pandora's line of argument. Cf. *Elezovic v Bennett*, 480 Mich 1001, 1001; 742 NW2d 349 (2007) (memorandum) (disapproving use of interpretive canons in absence of linguistic ambiguity).

Pandora attempts to justify its misplaced interpretive tack by taking issue with Deacon's characterization of the VRPA as a remedial, consumer-protection statute. Pointing to the statute's provision for a misdemeanor prosecution, MCL 445.1714, Pandora argues that the Act is penal in nature, and should be strictly construed. (Appendix at 205a.)

But even granting Pandora's unfounded premise that a rule of construction is needed, Pandora is incorrect. "The mere inclusion of a misdemeanor provision does not render the act a criminal statute that must be strictly construed." *W Mich Univ Bd of Control v State*, 455 Mich 531, 545; 565 NW2d 828, 834 (1997). The clear purpose of the VRPA is to protect the important privacy rights of consumers. An inordinately narrow construction would derogate from the Legislature's intent.

B. Pandora "lends" sound recordings, and, conversely, Deacon "borrows" sound recordings from Pandora.

Having established that "lending" means the temporary bestowal of something on someone else, it is clear that Deacon adequately alleged that Pandora "lends" and Deacon "borrowed" music files. Taking the facts alleged by Deacon as true, and drawing all reasonable inferences in Deacon's favor, his claim has the "substantive plausibility" that Federal Civil Rule 8 requires.

According to the complaint, in order to enable a user to listen to a song through the user's computer, Pandora transmits a digital file containing the entire song to the user's computer. (Appendix at 140a, 143a; see id. at 41a-42a; Deacon Mich Merits Br, at 12-14.) That file is at the user's temporary disposal until the song has finished playing. A user like Deacon has access to that digital file in same

way he would have access on his computer to an eBook that he borrowed from a library—for a limited time and limited purpose. There is no doubt, therefore, that Pandora “lends” sound recordings.

And the analysis regarding Pandora’s act of lending is effectively the same as to Deacon’s act of borrowing: Because Deacon takes advantage of the temporary access he has to Pandora’s files, he borrows them. (Appendix at 143a; see *id.* at 58a; Deacon Mich Merits Br, at 14.) At the pleading stage, nothing more is required.

1. *Pandora’s primary rebuttals flout the Federal Rules of Civil Procedure.*

Pandora’s principal response to these inevitable conclusions is inappropriate at this stage of the proceedings. In brief after brief, Pandora has sought dismissal on the ground that it does not actually transmit entire digital files to Pandora users. (Pandora ND Cal Br in Supp Mot to Dismiss, at 9; Appendix at 184a.) Alternately, Pandora repeatedly argues that its operation is indistinguishable from “terrestrial radio.” (Appendix at 198a; Pandora Opening Mich Br, at 17.) These are factual disputes, and neither is relevant to the question whether Deacon has plausibly alleged that Pandora “lent” or “lends” music.

As a matter of federal procedure, FR Civ P 12(b)(6) contains no mechanism for resolving these kinds of factual disputes. See *Jewel v Nat’l Sec Agency*, 673 F3d 902, 907 n 4 (CA9, 2011) (“At the motion to dismiss stage, we do not consider the merits of [plaintiff’s] claims.”). That is why, on a motion to dismiss for failure to state a claim, a plaintiff’s factual allegations must be accepted as true. See *OSU Student Alliance v Ray*, 699 F3d 1053, 1058 (CA9, 2012). Pandora clearly disputes

Deacon's well-pleaded factual allegations, but "factual disputes . . . should be raised at the summary judgment stage and not as part of a defendant's motion to dismiss." *Aziz v Eldorado Resorts, LLC*, 72 F Supp 3d 1143, 1149 (D Nev, 2014); see *United Transp Union v BNSF Ry Co*, 710 F3d 915, 930–31 (CA9, 2013). And, of course, Pandora presents argument, not evidence, so their assertions could not justify a judgment on the merits, anyway. See *Barcamerica Int'l USA Trust v Tyfield Importers, Inc*, 289 F3d 589, 593 n 4 (CA9, 2002) ("the arguments and statements of counsel are not evidence"); *Devereaux v Abbey*, 263 F3d 1070, 1078 (CA9, 2001) (en banc) (affirming summary judgment for defendant because plaintiff failed to support argument with evidence).

Moreover, as Deacon previously has explained, Pandora's assertions are factually incorrect. Regarding Pandora's assertion that it transmits only portions of songs, Deacon is prepared to demonstrate, after full discovery and at a trial on the merits, that Pandora is flat wrong about how it characterizes its services. (Deacon ND Cal Br Opp Mot to Dismiss, at 2–4; Deacon Mich Merits Br, at 9 n 2.)

And Pandora's attempt at conflating its "online radio" with traditional "terrestrial radio" ignores several key distinctions between the two. Listeners to terrestrial radio, for instance, have no immediate influence over a station's programming or the ability to skip or pause the song currently playing. And even more importantly, terrestrial radio does not track what songs a person listens to, or even who is listening to them. Pandora does. (See Deacon Mich Merits Br, at 3–4; Appendix at 65a-66a.) And although it seems reasonable to suppose that people

don't say they are going to "borrow" music from terrestrial radio, everyone says they "stream" music from Pandora. And Pandora's method of streaming is functionally indistinguishable from iTunes' video service (see *supra* at 11), which is commonly understood as "lending."

2. *Pandora cannot explain the relevance of the other factual distinctions it asserts.*

Pandora and the California district court split a number of irrelevant hairs attempting to establish that Pandora does not "lend" music.

The district court focused narrowly on the fact that songs downloaded to a computer by Pandora are deleted when Pandora is closed, rather than physically reverting to Pandora. (Appendix at 122a; see also Pandora Opening Mich Br, at 18.) In the district court's view, lending requires that the thing borrowed physically revert to the lender. (Appendix at 122a) Yet, as even Pandora recognizes, "lend" can be defined as "to put at another's temporary disposal," a definition that has no physical reversion requirement. (Pandora ND Cal Br in Supp of Mot to Dismiss, at 8–9.) Similarly, many other definitions omit a physical reversion requirement. Black's, as explained, defines "loan" only as "a grant of something for temporary use." Black's Law Dictionary (9th ed. 2009). That cogently describes how Pandora's services worked during the relevant time: when Pandora transmitted a complete digital copy of a sound recording to a consumer's computer, it put that song at the user's "temporary disposal," granting the consumer temporary use of the song.

A physical reversion requirement also is inconsistent with the use of "lend" and "loan" in many digital contexts. The electronic books loaned by libraries are not

physically returned at the end of the loan period. In many cases, all that happens is that the borrower's permission to access the file is revoked. In other words, the file is no longer at the borrower's disposal. See, e.g., Capital Area District Library, *Digital Downloads: Books*, <<http://www.cadl.org/ebooks/what-and-how/digital-downloads/books/>> (accessed Nov. 6, 2015) (under "Basic Information," explaining that "returning" an eBook is unnecessary because "[t]he digital item's file will automatically stop working at the end of the checkout period"); Rochester Hills Public Library, *eBranch@RHPL Frequently Asked Questions*, <<http://ebranch.rhpl.org/index.php/ebooks/18-ebooks/40-ebooks-frequently-asked-questions>> (accessed Nov. 6, 2015) ("Once the checkout period for your eBook is over, the eBook file will automatically 'expire' and you will no longer be able to access it on your computer or eReader device. There is no need to 'return' it to the library (and no worrying about overdue fines!)").

For its part, Pandora pushes back against the proposition that a user has temporary access to a sound recording by moving the goalposts: It doesn't matter that Pandora users can listen to a sound recording, Pandora says, because users have no ability to *control* the sound recording. (Appendix at 195a-196a; Pandora Opening Mich Br, at 19–20.) But in support of this position, Pandora cites only to its Terms of Service, under which users agree that they will not alter recordings transmitted to their computers. The question, however, is not what users agree to, but how to characterize what Pandora does.

Moreover, the contention that Pandora's user agreement establishes that users lack control over songs transmitted by Pandora distorts the standard of review that is applied to a complaint in federal court. The fact that Pandora asks users to agree that they will not manipulate songs is an implicit concession that users actually have the power to do so. At least, that is a reasonable inference, and under federal pleading rules, Deacon is entitled to the benefit of all reasonable inferences at this stage of the proceedings. See *Retail Prop Trust v United Bhd of Carpenters & Joiners of Am*, 768 F3d 938, 945 (CA9, 2014).

That inference also has the virtue of incorporating settled rules of contract interpretation. If Pandora were correct that users are unable to "control" transmitted songs, that portion of their Terms of Use would be superfluous. Yet contracts must be construed, so far as practicable, to give meaning to every word or phrase. See *Kapp v United Ins Grp Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). And, of course, a user has *some* control over a file they borrow from Pandora: they can pause the song or skip it, and they can let Pandora know that they approve or disapprove of the song, which affects what songs Pandora subsequently lends to the listener. (S-1 Reg Stmt, at 1, 3, 71; see Deacon Mich Merits Br, at 18 n 12.)

But, Pandora continues, even if users have some measure of control over songs transmitted to them, that control is incomplete, and therefore Pandora does not lend sound recordings. Users cannot rewind or fast-forward songs, and can listen to a particular track only once, and that, Pandora incorrectly asserts, makes all the difference. (Pandora Opening Mich Br, at 16–18.) In part, Pandora's

argument is a makeweight, meant to paper over flaws in Pandora’s misplaced “active use” theory. But it fails to do even that: An object can be “used” even if the use cannot be undone. See Merriam-Webster Dictionary, *Use*, <<http://www.merriam-webster.com/dictionary/use>> (last accessed Nov. 6, 2015) (defining “use” as “to expend or consume by putting to use”). Deacon, for instance, might borrow an egg from a neighbor for his own use, but after he cracks that egg on a bowl he cannot “rewind” in order to give a full egg back to his neighbor. See *id.* (using eggs as an example). In the same way, Deacon can “use”—that is, “consume”—the sound recordings lent him by Pandora. (See also Appendix at 263a.)

More to the point, this Court previously has refused to read a requirement of “complete” control into a statute where none is required by the text. In *People v Yamat*, this Court reversed the district and circuit courts’ refusal to bind the defendant over for trial under former MCL 257.626c, which proscribed reckless driving and punished the person who “operate[d]” the recklessly driven vehicle. 475 Mich 49, 53, 56–58; 714 NW2d 335 (2006) (per curiam). The Court of Appeals, in affirming the lower courts, had equated “operate” with “exclusive control,” and concluded that probable cause did not exist to bind over the defendant because he had not exercised “exclusive” control over the car—his girlfriend had control over the pedals and at least some control over the car’s steering wheel. *Id.* at 53–54. This Court reversed because the Court of Appeals’ requirement of complete or exclusive control over the vehicle “d[id] not comport with the plain language” of the statute. *Id.* at 56–57. Pandora’s requirement of complete control likewise does not comport

with the plain language of the VRPA. See also *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010) (“Dominion or control over the object need not be exclusive.”).

Similarly, Pandora contends that Deacon’s claims must fail because Pandora selects the songs it lends to Deacon. That contention ignores the ordinary use of the words “lend” and “loan.” A loan is no less a loan simply because the lender chooses the content. As Deacon has explained, if he had been given a CD by a friend on the understanding that it be returned after a short period of time, that would be an act of lending whether or not Deacon had any say in what CD his friend lent him. (Deacon Mich Merits Reply Br, at 4.) And whether Pandora ultimately selects when or if a particular song is transmitted to Deacon’s computer is immaterial to whether Pandora violated the VRPA. The Act protects Deacon’s privacy by prohibiting the disclosure of information “concerning . . . borrowing of [sound recordings] by a customer.” Deacon alleges that Pandora disclosed information concerning what music Deacon borrowed from it when he created Pandora stations by inputting specific songs and artists revealing his musical preferences. On this point, and at this stage, the statute asks for no more.

II. Deacon sufficiently alleged the remaining elements of a VRPA claim.

As explained above, Deacon’s complaint properly alleges that Pandora lent and Deacon borrowed sound recordings, the first two elements of a VRPA claim. The third and fourth elements—that Pandora disclosed information concerning that borrowing and that the information disclosed indicated Deacon’s identity—are the subject of comparatively less dispute. As to the third element, the analysis follows

directly from the analysis of the question whether Pandora “lends” music: The information disclosed by Pandora relates exclusively to (and thus “concerns”) the music Pandora lent, and Deacon borrowed, through Pandora’s website. (Appendix at 141a, 144a-145a.) Further, with respect to the final element of his claim, Pandora’s disclosures included his name, and thus indicated his identity. (Appendix at 144a-145a; see Deacon ND Cal Br Opp Mot to Dismiss, at 12–14; Deacon Mich Merits Br, at 5.) Both the district court and the Ninth Circuit recognized that Deacon adequately pleaded this element (Appendix at 120a, 283a n 4.)

Pandora offers only one, weak response: Deacon’s pleading failed to specify what information Pandora disclosed. (Pandora ND Cal Mot to Dismiss, at 14–15 & n 21.) This argument is emblematic of Pandora’s continued struggle with the Federal Rules of Civil Procedure. As an initial matter, the argument is ostrich-like, ignoring the very specific allegations of Deacon’s complaint. (See Appendix at 120a, 283a n.4.) But in any event, Pandora’s concern is properly raised not through a motion to dismiss under Federal Civil Rule 12(b)(6)—which is what Pandora filed in the federal district court—but through a motion for a more definite statement under Federal Civil Rule 12(e), or through interrogatories and other discovery devices under Federal Civil Rules 30, 31, 33, and 36. See *Skaff v Meridien N Am Beverly Hills, LLC*, 506 F3d 832, 841–42 (CA9, 2007). Moreover, argument regarding a complaint’s lack of specificity does not provide a basis for dismissal, so long as it appears that the plaintiff will be able to provide the requisite specificity. See *United States v Employing Plasterers Ass’n*, 347 US 186, 189; 74 S Ct 452; 98 L Ed 618

(1954); *Wagner v First Horizon Pharmaceutical Corp*, 464 F3d 1273, 1280 (CA11, 2006); *Am Nurses Ass'n v Illinois*, 783 F2d 716, 725 (CA7, 1986). Pandora does not contend that a request for a more definite statement would be futile.

III. Federal copyright law does not have any role to play in this litigation, much less compel a ruling in Pandora's favor.

Pandora further contends that federal copyright law in some way bars Deacon's claims. The details of this argument have changed from brief to brief, but each iteration is meritless and/or raises a question of federal law outside the scope of the certified question. In the main, though, Pandora's invocation of copyright law is a red herring, relying upon irrelevant licensing agreements and inapplicable canons of statutory construction, and ignoring crucial statutory context.

Pandora first invoked copyright law to argue that because music licenses between Pandora and various performance rights organizations (such as the American Society of Composers and Producers) did not authorize Pandora to rent or lend their music, Deacon could not assert that Pandora lent music. (Pandora ND Cal Mot to Dismiss, at 10–12.) In legal terms, Pandora's argument boils down to the contention that because Pandora asserted to, for instance, ASCAP that it would not “lend” music *Deacon* is judicially estopped from asserting that it does. That is an issue of federal law, and in any event is preposterous: “judicial estoppel bars only inconsistent positions taken by the *same party* in two different matters.” *Milton H. Greene, Inc v Marilyn Monroe LLC*, 692 F3d 983, 996 (CA9, 2012) (emphasis added). Deacon has not taken a position on the license between Pandora and ASCAP, or any

other license Pandora holds. Pandora's licenses have no effect on Deacon's allegations that Pandora lends music.

Pandora also has argued that the federal Copyright Act, 17 USC 101, *et seq.*, and federal copyright cases involving digital music delivery provide persuasive guidance for determining whether Pandora lends sound recordings. (Pandora Opening Mich Br, at 20-21.) As an initial matter, the Copyright Act nowhere defines "lend." So Pandora's suggestion that the term "lend" should be given the same meaning under the VRPA that it has under the Copyright Act goes nowhere.

Furthermore, "[t]he persuasiveness of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed" *Garg v Macomb Cnty Community Mental Health Servs*, (*Amended Opinion*), 472 Mich 263, 283; 696 NW2d 646 (2005). An assessment of the profound differences between the Copyright Act and the VRPA exposes the futility in looking to the former to interpret the latter. The Copyright Act seeks to encourage creative production by ensuring a musician's right to profit from his own creation while still allowing for the dissemination of new works. See *Mazer v Stein*, 347 US 201, 219; 74 S Ct 460; 98 L Ed 630 (1954). Congress, through the Copyright Act, accomplishes this goal by regulating differently the different mediums through which music can be disseminated. See 17 USC 106, 114. The VRPA, on the other hand, protects the privacy of Michigan consumers. (See Deacon Mich Merits Br, at 24; Appendix at 267a-269a.) The finely wrought, context-specific distinctions drawn by the Copyright Act are unnecessary to the administration of the VRPA. Whether

Pandora distributes or performs music for purposes of the Copyright Act is irrelevant to whether Pandora lends music for purposes of the VRPA.

In a similar vein, Pandora resorts to the principle that two potentially conflicting statutes should be construed—so far as allowed by the statutory language—not to conflict, and suggests that a finding that Pandora “lends” would set the VRPA at odds with the Copyright Act. (Pandora Opening Mich Br, at 20.) That argument is likewise misplaced. The VRPA is not in conflict with the Copyright Act. The only “conflict” Pandora sees is between Deacon’s claim and Pandora’s licenses with various performance rights organizations. But the licenses are contractual in nature, not statutory. See *MDY Indus, LLC v Blizzard Entmt, Inc.*, 629 F3d 928, 939 (CA9, 2010). Pandora’s chosen interpretive canon, therefore, is inapplicable.⁷

Pandora points out that statutes play a role in all music licenses. (See, e.g., Pandora Mich Br, at 20–21.) That proposition is true, so far as it goes, but it fails to justify Pandora’s argument. For instance, 17 USC 114 covers licenses with the rights organization SoundExchange: If Pandora and SoundExchange were unable to come to an agreement on rates, § 114 provides a mechanism for determining the rate. See *Beethoven.com LLC v Librarian of Congress*, 394 F3d 939, 943 (CAD9, 2011).

⁷ Moreover, even if it did apply, Pandora’s argument relies on the unstated premise—which Deacon does not concede—that Pandora was, in fact, in compliance with its licenses between 2008 and 2011. As substantiating that premise would require fact-finding, it would be improper to accept Pandora’s argument on this record. See *United States v Corinthian Colleges*, 655 F3d 984, 999 (CA9, 2011) (“[W]e may not, on the basis of evidence outside of the Complaint, take judicial notice of facts favorable to Defendants that could reasonably be disputed.”).

2005) (describing process). And for other organizations like ASCAP, licenses are also required under consent decrees between the organization and the U.S. Department of Justice following litigation under the Sherman Act, 15 USC 1. See *United States v Am Soc’y of Composers, Authors & Publishers*, 32 F3d 727, 728–29 (CA2, 1994) (describing Sherman Act litigation). But a contract is a contract whether it is required by statute or not. See, e.g., *Broad Music, Inc v DMX Inc*, 682 F3d 32, 43 (CA2, 2012) (“consent decrees are construed basically as contracts”).

Pandora also suggests that interpreting the VRPA to conclude that Pandora lends music would result in Michigan law usurping the federal Copyright Act. (Appendix at 188a, 201a (citing *SOS, Inc v Payday, Inc*, 886 F2d 1081 (CA9, 1989)). But Pandora’s argument distorts the *Payday* case on which it relies beyond recognition. *Payday* stands for the principle that, when a court interprets a copyright license, state law rules of contract interpretation must yield to the Copyright Act if they conflict. *Payday*, 886 F2d at 1088; see also *Cohen v Paramount Pictures Corp.*, 845 F2d 851, 854 (CA9, 1988). Deacon does not ask this Court to interpret Pandora’s license, so this principle has no role to play in this litigation.

Pandora’s broader point, it appears, is that the rate courts (for the consent-decree licenses) and the Copyright Royalty Judges (for licenses governed by § 114) adjudicate Pandora’s licensing rates on the assumption that Pandora only broadcasts music as that term is understood under the Copyright Act and therefore cannot be lending music to Deacon. Thus, presumably, that assumption should hold sway in this litigation. Pandora’s argument begs the question whether those terms

have identical meanings under the VRPA and the Copyright Act. As explained above, they do not.

Relatedly, Pandora appears to assert that because its ASCAP license previously was the subject of federal court proceedings, a separate court cannot now conclude that Pandora “lends” music in violation of its license. (Appendix at 203a-204a.) At best, this represents a plea for the application of issue preclusion. This argument is groundless. Pandora appears to rest its contention on *In re Pandora Media, Inc.*, 6 F Supp 3d 317 (SDNY, 2014), in which a federal district court determined an appropriate licensing fee for Pandora to pay ASCAP. See 6 F Supp 3d at 354–55. At no point, however, did the *Pandora Media* court make any findings of fact or reach any conclusions of law about Pandora’s services, or the validity of their license. See *id.* at 327–30; see also *B&B Hardware, Inc v Hargis Indus, Inc*, 135 S Ct 1293, 1303; 191 L Ed 2d 222 (2015) (explaining that one prerequisite for the application of issue preclusion is that the issue must have been “actually litigated”). Furthermore, it is black-letter law that litigation only has issue preclusive effect in subsequent litigation if the party against whom the doctrine is invoked had a full and fair opportunity to try the issue in the first litigation. See *Kourtis v Cameron*, 419 F3d 989, 994 (CA9, 2005). Here, Deacon did not have such an opportunity, because he was not a party to the litigation that Pandora seeks to use preclusively against him here.

Finally, copyright law contains a “volitional use” requirement similar to that imposed by the district court: that factor helps divide direct and contributory

copyright infringement. See, e.g., *Fox Broad Co, Inc v Dish Network LLC*, 747 F3d 1060, 1067–68 (CA9, 2013). Seen in this light, the district court’s holding essentially says that because Deacon would not be directly liable for copyright infringement to an artist for using Pandora, he therefore also does not borrow music from Pandora. *Id.*; see also *Cartoon Network LP, LLLP v CSC Holdings, Inc*, 536 F3d 121, 130–32 (CA2, 2008). The district court provided no clue as to why activity constituting direct infringement, but not contributory infringement, should be punished under an unrelated statute. Nor could it: Courts distinguish between direct and contributory infringement due to “the critical importance of not allowing the [copyright holder] to extend his monopoly beyond the limits of his specific grant.” *Sony Corp of Am v Universal City Studios, Inc*, 464 US 417, 441; 104 S Ct 774; 78 L Ed 2d 574 (1984). Neither the VRPA generally nor this case specifically seek to test the outer bounds of any actor’s monopoly over their intellectual property. This case is about privacy. The minutiae of copyright law are inapplicable.

IV. The VRPA can be applied to Pandora’s technology.

Before this Court, Pandora argues that deference to the Michigan Legislature compels a ruling in its favor. Specifically, Pandora suggests that the Michigan Legislature should be allowed to weigh in before the VRPA is applied to technologies that post-date its enactment. (Pandora Opening Mich Br, at 22–23.) But Pandora’s argument ignores the teachings of the case law on which it relies.

In *People v Gilbert*, this Court concluded that a motorist’s use of a radar detector could not be prosecuted under a statute that prohibited the use of

technology that received radio signals on frequencies assigned to law enforcement. 414 Mich 191, 196–97 & n 2; 324 NW2d 834 (1982). Pandora paints *Gilbert*’s holding as a firm rejection of the application of new technologies to old statutes. (See Pandora Opening Mich Br, at 22.) True, *Gilbert* does reject such an application, but in a case-specific way, and Pandora utterly ignores the reason why. This Court did not hide the ball: “[T]he statute protects the confidentiality of police *communications* but not electronic *surveillance* by the police. The question whether persons should be barred from installing devices designed to detect electronic surveillance was not addressed by the Legislature when this statute was enacted in 1929.” *Id.* at 197 (emphasis in original). In part, the Court acknowledged, that question had gone unaddressed because the technology to detect police surveillance was undeveloped when the statute was passed. *Id.* at 202. But the Court was also clear that the statute did not apply primarily because the new technology posed problems outside the ambit of the statutory language. In fact, the *Gilbert* Court recognized that statutes clearly could apply, in some instances, to new technology: “Technological innovation may not be an obstacle to the application of a statute where the new technology facilitates the achievement of ends which the Legislature clearly meant to encourage or discourage.” *Id.* at 204.

Here, the technological innovation that allows Pandora to lend sound recordings in a way not known to the legislators that enacted the VRPA is not an obstacle to its application. The Act is clearly intended to prevent the dissemination of information about a person’s likes and dislikes related to music, books, and

videos. The modern technology that Pandora uses to deliver music enables it systematically to compile reams of data on Deacon's musical preferences and efficiently to disclose that protected data to the world. That is the end the VRPA plainly meant to discourage. Thus, as *Gilbert* makes clear, there is no need to wait for further word from the Michigan Legislature.

Pandora's belief that *Howell Educational Association v. Howell Board of Education*, 287 Mich App 228; 789 NW2d 495 (2010), supports its position is similarly unsustainable. There, the Court of Appeals determined that personal e-mails stored on public school servers were exempt from FOIA disclosure because those same emails would not have been disclosed if they were personal letters placed in a school mailbox. 287 Mich App at 238. That is, the court recognized that the analog equivalent of a digital situation provides a solid benchmark for determining how a statute applies in light of technological innovation.

Howell neatly captures Deacon's theory: Pandora's model is merely a high-tech version of activity that the VRPA obviously prohibits. As discussed, a library generally provides a reasonable low-tech comparison to what Pandora does. But consider also a hypothetical: Imagine that the old Columbia House Record Club—a popular music distribution service in the 1980's, when the VRPA was enacted⁸—was free of charge and required club members to return LPs after a period of time. Deacon would have signed up for the club by selecting a number of records that fit

⁸ See generally Bryan Bishop, *Columbia House, the Spotify of the '80s, is dead*, The Verge (Aug. 10, 2015, 5:13 pm), <<http://www.theverge.com/2015/8/10/9127703/columbia-house-mail-order-music-streaming-nostalgia>>.

his musical tastes, and over the years would have told Columbia House not to send certain records that did not fit those tastes. If Columbia House, without obtaining Deacon's consent, had made their records of what music Deacon did and did not like freely available to the public, they would be liable for violating the VRPA. Pandora's actions are materially identical to the hypothetical Columbia House. (See also *Deacon Mich Merits Br*, at 19.) And under *Howell*, because Columbia House would be liable, so should Pandora be. If Pandora wanted to avoid liability for disclosing Mr. Deacon's musical tastes to the world, it needed only to obtain his consent. See MCL 445.1713(a) ("[Protected information] may be disclosed . . . [w]ith the written permission of the customer.").

Finally, proposed amendments to the VRPA currently languishing in the Senate's Commerce Committee cannot provide Pandora any solace. Proposed—but not enacted—bills that postdate (by three nearly decades) enacted legislation are of dubious, if any, value in determining earlier legislative intent. At issue in this case is whether Pandora violated the VRPA as it currently exists, not whether Pandora violated the VRPA it hopes eventually will be enacted. See, e.g., *Pension Benefit Guaranty Corp v LTV Corp*, 496 US 633, 650; 110 S Ct 2668; 110 L Ed 2d 579 (1990). Based on the VRPA's language and the clear intent of the legislature that actually passed the Act, that answer is plainly "yes."

CONCLUSION

Peter Deacon alleges sufficient facts to render his claim against Pandora Media, Inc., substantively plausible. As his allegations relate to the certified

question, Pandora's act of granting Deacon temporary access to a piece of music is a commonly understood act of lending. This Court should answer the certified question in the affirmative.

Dated: November 6, 2015

Respectfully submitted,

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